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Lester Brickman

Benjamin N. Cardozo School of Law, brickman@yu.edu

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A MASSACHUSETTS DEBACLE: *GAGNON V. SHOBLOM*

Lester Brickman*

In *Gagnon v. Shoblom*,¹ a case widely noted in the news media² and closely watched by the plaintiffs' bar, the Massachusetts Supreme Judicial Court reversed the trial court's determination that a one-third contingent fee amounting to \$975,000, was outrageous and unconscionable. In an inerudite³ and uninformed⁴ opinion, the court upheld the one-third fee and effectively rejected the applicability of fiduciary principles and ethical rules to plaintiffs' lawyers' fees provided their clients did not object. The authoritativeness of the court's opinion is questionable.⁵ Substantively, the decision rejects the

* Professor of Law, Benjamin N. Cardozo School of Law

¹ *Gagnon v. Shoblom*, No. 88-2105 (Super. Ct. Hampden County Feb. 20, 1990), *rev'd*, 409 Mass. 63 (1991).

² See, e.g., *Fees Out of Line?*, NAT'L LAW J., Feb 12, 1990, at 6; Kennedy, *Reduction in Lawyer's \$975,000 Fee Is Unanimously Reversed by SJC*, Boston Globe, Jan 11, 1991, at 42 (city ed.); Bates, *Key To The Courthouse*, LAWYERS MONTHLY, Sept. 1990, at 1; Green, *Judge Decides Big Lawyer Fee Is Out of Order*, Wall St. J., September 9, 1990, at B1, col. 6.

³ The court did not discuss or otherwise indicate familiarity with contingent fee literature or case law or the issues raised therein. For an analysis of both the literature and case law, see Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29 (1989) [hereinafter *Contingent Fees*].

⁴ Since the client did not object to the one-third fee, the appeal by his attorney to the Massachusetts Supreme Judicial Court was *ex parte* in nature. The trial judge's opinion was not represented. The attorney's position was supported by amicus briefs filed by the Massachusetts Bar Association and the Massachusetts Academy of Trial Attorneys. The lack of opposition resulted in the court's being uninformed of opposing arguments.

⁵ The *ex parte* nature of the appeal raises issues similar to those raised in *In re Application of Cooper*, 22 N.Y. 67 (1860). The issue in *Cooper* broadly dealt with who had the authority to regulate the practice of law in New York: the courts or the legislature. More specifically, the issue was the validity of a legislative enactment providing that the graduates of Columbia Law School should be admitted to the bar without judicial examination. *Id.* at 87-95 (discussing the constitutionality of 1860 N.Y. Laws § 202). The lower court had decided that the act was unconstitutional on the ground that the legislature had encroached upon its judicial power to regulate the practice of law and refused to admit Cooper to the bar. *In re the Graduates*, 10 Abb. Pr. 357 (Sup. Ct.) (Bonney, J.), *rev'd sub nom. In re Cooper*, 22 N.Y. 67 (1860). Cooper was represented on appeal by Theodore Dwight. Dwight had reopened the Columbia School of Law in 1858 and constituted its whole faculty at the time. 3 A. CHESTER, COURTS AND LAWYERS OF NEW YORK; A HISTORY 1609-1925, at 1337 (1925). This appeal, too, was *ex parte*; no advocate opposed Dwight. The New York Court of Appeals opinion relied heavily on Dwight's self-interested brief and adopted much of it although it contained errors of fact, history and law. See Kennedy, *Has The New York Legislature The Paramount Right To Regulate The Admission of Attorneys?* (pt. 1), 99 N.Y.L.J. 1 (April 6, 1938). See generally Lee, *The Constitutional Power of the Courts Over Admission to The Bar*, 13 HARV. L. REV. 233, 240 (1899). The *ex parte* nature of the appeal was later severely criticized by the New York Supreme Court. Justice Sutherland characterized the New York Court of Appeals action as an

court's own rules regulating the reasonableness of contingent fees⁶ and errs in its mindless rejection of fiduciary principles and ethical rules. It should be rejected, as authority, by other courts considering the validity of a contingent fee.

I. CONTINGENT FEES

The contingent fee is a financing device which enables a client to assert a claim while limiting his exposure to loss though also limiting his potential gain.⁷ The essence of the contingent fee is reward for risk.⁸ The risk-sharing attorney claims a reward, which is effectively a multiple of his opportunity cost (hourly rate) for assuming the risks of losing the case and of having to devote substantially more time to the matter than anticipated. If risk is not borne, a reward for assuming that risk cannot be claimed; if there is no contingency, a lawyer may not charge a multiple of his opportunity cost. Stated simply, if there is no contingency, then a lawyer cannot charge a contingent fee.⁹

Since only the existence of a realistic risk regarding effort and recovery justifies charging a premium for risk, it follows, a fortiori, that if there is risk, then the risk premium must be proportionate to the risk and anticipated effort.¹⁰

Charging a contingent fee percentage in a case involving little or no risk, which is designed to effectively yield double or triple the lawyer's opportunity cost, or \$400-600 per hour assuming an hourly rate of \$200, is almost certainly unethical¹¹ and illegal.¹² It is just as unethical and illegal as a lawyer billing a client for fifty hours when he has only worked ten hours. Charging for a risk that is not being assumed and charging for work not done are both fraudulent acts. An analysis of *Gagnon* indicates that though the lawyer charged a substantial risk premium, he assumed little risk.

"extraordinary proceeding" which had "the appearance of a want of respect for law and order." *In re the Graduates*, 11 Abb. Pr. 337 (Sup. Ct. 1860). When the issue of authority to regulate the practice of law was revisited by the New York Court of Appeals in *Karlin v. Culklin*, 248 N.Y. 465, 162 N.E. 487 (1928), Chief Judge Cardozo restated the history of regulation of the practice of law in England and New York. *Id.* at 471-77, 162 N.E. at 491-92. In essence, he rejected Dwight's historical argument that courts did not possess the power to regulate the practice of law, and in the process, corrected errors in Dwight's brief (available at the Columbia Law Library, call no. TC 78243i), the *Cooper* court's opinion, *see id.*, and relegated *In re Cooper* to the briefest mention, *id.* at 477, 162 N.E. at 492.

⁶ *See infra* text accompanying notes 34-36.

⁷ For an analysis of contingent fees, *see Contingent Fees, supra* note 3.

⁸ *See id.* at 89-93, 117 (analysis of risk).

⁹ *Id.* at 74-88.

¹⁰ *Id.* at 94-99.

¹¹ *Id.* at 70-74; *see also infra* notes 45-60.

¹² *Id.* at 51-70; *see also infra* notes 37-44.

II. *GAGNON V. SHOBLUM*¹³A. *The Facts*

On a clear, dry afternoon, the plaintiff, forty-four years old, stopped to assist a tractor-trailer which was stopped in the break-down lane of the Massachusetts Turnpike. Plaintiff parked his truck in front of the disabled vehicle and went underneath it to attempt to help fix it. A loaded garbage truck owned by Browning-Ferris Industries, veered off the highway into the break-down lane and crashed into the tractor-trailer. The driver of the latter was killed and plaintiff sustained massive injuries, rendering him a paraplegic, paralyzed from the waist down with permanent loss of bowel and bladder control, of penile function, and requiring life-long medical care. Plaintiff retained an attorney and entered a one-third contingent fee agreement.¹⁴

A structured settlement was entered into with a present cash value of \$2,925,000, yielding a fee of \$975,000 to the attorney.¹⁵ Since this was a third-party action involving worker's compensation, the settlement had to be approved by a reviewing board or a court.¹⁶ The superior court judge of the court in which the action was filed felt that the amount of the fee was extremely high and held evidentiary hearings on the fee.¹⁷

The judge found that the attorney had worked hard, thoroughly prepared, and presented the case well. Additionally, he achieved a very favorable result for which he was entitled to be "handsomely compensated."¹⁸ However, under applicable court rules,¹⁹ the "reasonableness" of a contingent fee was subject to review by a court of competent jurisdiction in light of the circumstances prevailing at the time the agreement was entered into, including the uncertainty of the compensation. The judge determined that at the time the contingent fee was entered, "the liability aspects . . . were very strong and [the] . . . injuries were probably catastrophic It was . . . highly probable that he would ultimately receive either a very substantial judgment or a very substantial settlement."²⁰ Moreover, "it was obvious

¹³ No. 88-2105 (Super. Ct. Hampden County Feb. 20, 1990) [hereinafter Superior Court Opinion], *rev'd*, 409 Mass. 63 (1991).

¹⁴ Superior Court Opinion, *supra* note 13, at 1-3.

¹⁵ *Id.* at 3.

¹⁶ *Id.* at 10 (citing MASS. GEN. LAWS. ANN. ch. 152, § 15 (West 1988)).

¹⁷ *Id.* at 4-5.

¹⁸ *Id.* at 8.

¹⁹ MASS. SUP. JUD. CT. R. 3:05, §§ 5(e), 6.

²⁰ Superior Court Opinion, *supra* note 13, at 4-5. The court noted that after the action had been commenced, defendants developed a "plausible defense"—that the driver was suffering

... that the case would probably culminate in a negotiated settlement
 ...²¹ He then went on to state:

I am satisfied (both on the basis of my own experience as a practicing attorney and as a trial judge as well as by the evidence presented at the hearings) that in the case of a civil tort action in which damages are sought for personal injuries a contingent fee of 33 1/3% of the amount recovered is reasonable to a point [H]owever, . . . as the size of the recovery (and hence the size of the fee) increases, the spread between the attorney's fee and the fair value of the time, effort and skill that he devoted to earning that fee widens—and at some point the fee becomes unreasonable and even (if the spread becomes wide enough) outrageous or unconscionable. . . . When as in this case the injury sustained by the client is catastrophic, the amount of the reduction [in the client's recovery due to his lawyer's fee] can become enormous [A]fter all, [it is the client and not the lawyer] . . . who must spend the remainder of his life confined to a wheelchair with no bowel or bladder control and with constant dependence upon others to assist him in the normal tasks of day-to-day living. In a case such as this it is not reasonable to apply the 33 1/3% rate. . . .

. . . .
 In summary . . . [the attorney] had a very good case from the beginning. He had a strong case of liability, catastrophic damages, and a defendant with the financial wherewithal to pay almost any judgment that might be obtained. In addition, he had the benefit of the workmen's compensation act which meant that his client's medical expenses would be paid and that the client would be provided with sufficient income to survive while the third party action was pending, so pressure for a quick settlement was not nearly as intense as it would have been had no compensation benefits been available. *It was very nearly an ideal case from the point of view of a plaintiff's trial attorney.*²²

After rejecting the attorney's argument that the \$975,000 fee was reasonable in light of the amount of time devoted,²³ the judge then

from obstructive sleep apnea—but that the lawyer “through preparation and research” met that challenge, *id.* at 5, and that despite the theory advanced by defendants, the plaintiff's case remained a strong one, *id.* at 7.

²¹ *Id.* at 7-8.

²² *Id.* at 11-14 (emphasis supplied).

²³ Although the attorney did not keep time records, he did produce an estimate of the time he and his staff had devoted: 2,659.75 hours and 1,973.50 hours respectively. The judge responded:

I frankly find those estimates to be somewhat generous The issues involved, both legal and factual, were not so complex as to justify what would have amounted to devotion of nearly all of [the attorney's] own time for over a year, plus a substantial period of his staff's time, to a single case.

Id. at 6. Moreover, the judge continued, though not so informed by the attorney, he had

reduced the fee to \$695,000.²⁴

B. *Analysis of the Superior Court's Decision*

The determination to reduce the one-third fee by 28.7% to 23.76% of the settlement value was predicated on the unreasonableness of the one-third fee. After analyzing risk factors the court concluded that: it was apparent at the time of contracting that a multimillion dollar verdict was highly likely; the defendant had deep pockets; the client's medical and living expenses were being provided for while the action was pending; and that this was very nearly an ideal case.²⁵ However, the court failed to carry its analysis to the obvious conclusion to which its analysis inexorably led. Instead of branding the amount of the fee as unreasonable, the court should have said:

The attorney is limited to a fee commensurate with the risk he assumed. The court determines that the risk borne by the attorney at the time of entering into the retainer agreement was negligible and the substantial risk premium being charged violated both fiduciary law and ethical principles. Therefore the fee shall be reduced to an amount proportionate to the risk the attorney assumed.

Since it was apparent at the time of contracting that a recovery of at least \$2,500,000 was to be anticipated, that it was highly likely that the claim would be settled rather than tried, that the attorney would likely have to devote 500 hours to the matter, and that a fee of \$250 per hour would generously compensate the attorney for the negligible risk he was assuming, a fee of \$125,000 was appropriate. Therefore, the percentage that the attorney can legitimately charge is 5.0% (\$125,000 divided by \$2,500,000).²⁶ However, to build in additional protection for the attorney, in

learned that the attorney had also been retained to represent the estate of the driver of the tractor-trailer and the driver's mother, that that work done was undoubtedly included in the time estimates prepared by the attorney, that these claims had already been settled, and that the attorney had received a substantial but undisclosed fee for these services. *Id.* at 6-7. He also noted that the attorney had indicated expenses of \$72,000 for both sets of representation, mainly for production of a video tape for use as a negotiating tool which cost was to come out of the attorney's fees. *Id.* The judge did not indicate if he had inquired whether the attorney had represented any other clients or devoted time to any other matter that year; according to the attorney's time estimate, he could not have done so unless he was an insomniac.

²⁴ The judge found that a fee of 33 1/3% of the first \$300,000, 25% of the next \$1,200,000 and 20% of all amounts in excess of \$1,500,000 would be reasonable. *Id.* at 15.

²⁵ *Id.* at 11-14.

²⁶ See *Contingent Fees*, *supra* note 3, at 94-99.

light of costs to be advanced, the court sets the contingent fee at 10%, which is designed to generate a fee of \$250,000, or an hourly rate of \$500.

Instead of such an analysis, the court resorted to a form of gas-tronomic jurisprudence: I know an unreasonable fee when I see it²⁷ and deep down in my gut, I know that \$975,000 is too high a fee given what occurred.²⁸

The failure of the court to apply the doctrinally supportable, intellectual construct of the relationship between risk and reward for risk, between contingency and contingent fee,²⁹ and to use instead an idiosyncratic expression of reasonableness, left its decision highly vulnerable to the depredations of the trial bar.³⁰

C. *Gagnon Before the Massachusetts Supreme Court*

In a unanimous decision, the Massachusetts Supreme Judicial Court reversed the lower court and awarded the attorney the entire \$975,000 fee.³¹ Interpreting Massachusetts law, it concluded that the purpose of subjecting the settlement of a third-party action to judicial review did not include protecting the client's interests.³²

As for its own rule requiring that a contingent fee be reasonable,³³ the court held that the rule did not apply "because no one is challenging the contingent fee agreement."³⁴ The court recognized that even without its rule requiring that a contingent fee be reasonable, courts had inherent power to review a fee for reasonableness. However, that power could only be exercised if the fee was challenged by a party.³⁵ The Massachusetts court's contention that a contingent fee's reasonableness is insulated from review if the client does not object is without support in Massachusetts or any other jurisdiction.³⁶

²⁷ With apologies to Justice Potter Stewart. See *Jacobellis v. Ohio*, 378 U.S. 184, 197 (Stewart, J., concurring).

²⁸ See *supra* note 22 and accompanying text.

²⁹ See generally *Contingent Fees*, *supra* note 3.

³⁰ The Massachusetts Academy of Trial Lawyers' Amicus Curiae Brief noted: "The ruling below reflects little more than the judge's personal notion of reasonableness . . ." Massachusetts Academy of Trial Lawyers' Amicus Curiae Brief for Appellant at 11, *Gagnon v. Shablom*, 409 Mass. 63 (1991) (No. 5399). The opinion of the Massachusetts Supreme Judicial Court reflects the effectiveness of this characterization of the lower court's opinion as idiosyncratic rather than principled.

³¹ *Gagnon v. Shablom*, 409 Mass. 63 (1991).

³² *Id.* at 66.

³³ *Id.* at 66-67.

³⁴ *Id.* at 67.

³⁵ *Id.*

³⁶ A modicum of support for the court's position that a client complaint is a *sine qua non* for the application of fiduciary law and ethical rules to attorney fees may be found in United

It is wrong as a matter of law, policy, and ethics.

III. FIDUCIARY LAW

Lawyers, as fiduciaries for their clients,³⁷ are held to a "fairness-

States v. Vague, 521 F. Supp. 147 (N.D. Ill. 1981), *rev'd*, 697 F.2d 805 (7th Cir. 1983). In *Vague*, United States District Court Judge John F. Grady ordered a criminal defendant's attorney to return part of the fee that he had collected from defendant on the ground that the fee was exorbitant. The defendant and a codefendant were indicted for possession of, and, conspiring to possess, goods stolen from O'Hare Airport. After some procedural skirmishing, both defendants agreed to a plea bargain. In reading the presentence report, Judge Grady learned that the defendant's attorney had charged a fee of \$12,000. Upon further inquiry, he determined that the attorney had put in, at most, forty hours of work beneficial to his client of which about two-thirds had been spent in listening to tape recordings of electronic surveillance. Also, he learned that the codefendant's lawyer had charged his client \$1,250. Judge Grady then limited the defendant's attorney to a fee of \$2,500 and when the attorney refused to refund any amount below \$8,000 adjudged him in civil contempt.

Judge Grady is one of very few judges who has demonstrated a persistent willingness to examine attorney's fees and to order their reduction when they violate fiduciary and ethical rules. He is particularly outspoken about contingent fee abuses. See Grady, *Some Ethical Questions About Percentage Fees*, 2 LITIGATION 20 (Summer 1976). (He is joined in this regard by United States District Judge Jack Weinstein of the Eastern District of New York. See *In re Agent Orange Prod. Liab. Litig.*, 611 F. Supp. 1296 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 226 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988)).

On appeal of the *Vague* judgment, the attorney argued that his fee arrangement was none of the court's business since his client did not complain about the fee. Although Judge Posner writing for the Seventh Circuit found that position "untenable," *Vague*, 697 F.2d at 806, a closer reading of his opinion reflects otherwise. In finding in favor of the attorney, Judge Posner stated: "A judge cannot be made to approve an unethical transaction, but the district judge . . . was not asked to do any such thing; he was just asked to decide . . . [defendant's] punishment for a crime. To reach the fee question the judge had to start a separate proceeding." *Id.* at 808. Since defendant has "yet to raise a peep about the fee that the district judge has so vigorously denounced as excessive . . . we cannot find any basis for what the judge did in this case . . ." *Id.* (citation omitted). Therefore, instead of ordering a fee reduction in response to the ethical violation, the trial judge should have reported the unethical conduct to the disciplinary authorities.

In dissent, Judge Grant pointed out that the court had sustained Judge Grady's reduction of attorney fees in another case even though the parties had not objected to the fee. *Id.* at 809 (citing *Rosquist v. Soo Line R.R.*, 692 F.2d 1107 (7th Cir. 1982)). More importantly, Judge Grant noted that other circuits had sustained a trial court's inherent authority to supervise attorney's fees. *Id.* at 1111. Indeed, it is universally held that a judge has the inherent power to supervise attorney fees in matters before the court. *Contingent Fees*, *supra* note 3, at 39 n.42, 56 n.97.

Judge Posner's response to Judge Grant's well-supported proposition that judges have inherent power to regulate fees in matters before them was to ignore the point. Moreover, Judge Grady's sua sponte fee reduction was not a disciplinary response to violation of the rules of professional ethics, but rather one based on the lawyer's breach of the fiduciary obligation to the client to charge no more than a fair fee. For a discussion of fiduciary obligation, see *infra* notes 37-44 and accompanying text.

³⁷ See C. WOLFRAM, MODERN LEGAL ETHICS § 4.1, at 146 (1986). This Article presents an abbreviated discussion of the fiduciary obligation of a lawyer. For a fuller analysis, see *Contingent Fees*, *supra* note 3, at 44-70, and Brickman, *Attorney-Client Fee Arbitration: A Dissenting View*, 1990 UTAH L. REV. 277, 284 n.41 [hereinafter *Fee Arbitration*].

in-fact" standard, which is a higher and less self-interested standard than is applied to commercial transactants.³⁸ Under this standard, it is the attorney's obligation to give the same advice to his client in matters affecting the relationship as the client would have received had he sought the advice of a second lawyer.³⁹ The fairness-in-fact standard mandates that the attorney cannot use his superior knowledge or position to take advantage of the client.⁴⁰ The standard is violated, regardless of intent, whenever an attorney's action benefits the attorney, is not in the best interests of the client and the client has not given his informed consent.⁴¹

The fairness-in-fact standard applies to the attorney-client fee transaction.⁴² As a matter of fiduciary law, an attorney is not permitted to charge in excess of a reasonable fee.⁴³ Even if the client consents to the fee, but an informed and knowledgeable client would not have entered into the fee agreement, then the lawyer has likely breached the fiduciary standard.⁴⁴

³⁸ *Fee Arbitration*, *supra* note 37, at 284 n.43.

³⁹ *Gibson v. Jeyes*, 6 Ves. Jun. 266, 278, 31 Eng. Rep. 1044, 1050 (Ch. 1801); *see also*, *Fee Arbitration*, *supra* note 37, at 284 n.43.

⁴⁰ *See Whitehead v. Kennedy*, 69 N.Y. 462, 466 (1877).

⁴¹ *Fee Arbitration*, *supra* note 37, at 285 nn.48-49, 288 n.60.

⁴² *Id.* at 287 n.57.

⁴³ *See Kiser v. Miller*, 364 F. Supp. 1311 (D.D.C. 1973), *aff'd in part and rev'd in part sub nom. Kiser v. Huger*, 517 F.2d 1237 (D.C. Cir. 1974). In *Kiser*, the district court stated:

[A]n attorney is entitled to no more than a reasonable fee, no matter what fee is specified in the contract, because an attorney, as a fiduciary, cannot bind his client to pay a greater compensation for his services than the attorney would have the right to demand if no contract had been made.

Id. at 1319; *see also* G. HAZARD, *ETHICS IN THE PRACTICE OF LAW* 99 (1978) ("A contract for a [legal] fee is, under general principles of law, a contract between a fiduciary and his protected dependent . . . [and] it is unenforceable unless its terms are fair to the client."); 520 E. 72nd Commercial Corp. v. 520 E. 72nd Owners Corp., 691 F. Supp. 728, 738 (S.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989); *Newman v. Silver*, 553 F. Supp. 4855, 496 (S.D.N.Y. 1982), *aff'd in part and vacated in part*, 713 F.2d 14 (2d Cir. 1983).

⁴⁴ *Contingent Fees*, *supra* note 3, at 51 n.88. When a client "consents" to an excessive fee, a rebuttable presumption is raised that the client has not comprehended the agreement. *See Gair v. Peck*, 6 N.Y.2d 97, 106, 160 N.E.2d 43, 48, 188 N.Y.S.2d 491, 498 ("[T]he amount of the fee, standing alone and unexplained, may be sufficient to show that an unfair advantage was taken of the client . . ."), *modified*, 6 N.Y.2d 983, 161 N.E.2d 736, 191 N.Y.S.2d 951 (1959), *appeal dismissed and cert. denied*, 361 U.S. 374 (1960); *High Point Casket Co. v. Wheeler*, 182 N.C. 459, 467, 109 S.E. 378, 383-84 (1921) (contingent fee percentage alone can show that unfair advantage has been taken of client); *Committee on Legal Ethics v. Tatterson*, 352 S.E.2d 107, 113 (W. Va. 1986) (client agreed to pay contingent fee exceeding risk of nonrecovery though he could afford to pay hourly fee and was informed of the hourly fee choice and risk; the court assumed the client did not understand discussion of risk and had not given "fully informed consent"); *see also Kiser*, 364 F. Supp. at 1319; *Florida Bar v. Moriber*, 314 So. 2d 145, 148 (Fla. 1975); *In re Kutner*, 78 Ill. 2d 157, 399 N.E.2d 963 (1979); *Cooper & Keys v. Bell*, 127 Tenn. 142, 153 S.W. 844 (1913); *cf. Klemm v. Superior Ct.*, 75 Cal. App. 3d 893, 898, 142 Cal. Rptr. 509, 512 (1977) ("As a matter of law a purported consent to dual

IV. ETHICAL OBLIGATION⁴⁵

Much of the law of professional responsibility is a codification of fiduciary doctrine.⁴⁶ Thus, the ethical duty that prohibits lawyers from "enter[ing] into an agreement for, charg[ing], or collect[ing] an illegal or clearly excessive fee"⁴⁷ derives from the fiduciary fairness-in-fact standard. Both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct recognize the validity of contingent fees.⁴⁸ The ethical justification for these approvals necessarily lies in the assumption that the lawyer's risk of receiving no fee, or a fee that effectively will be below his hourly rate, merits compensation in and of itself; bearing risk entitles the lawyer to a commensurate risk premium.⁴⁹

If a lawyer charges a premium for risk which he is not assuming, that conduct is illegal and unethical. It is illegal because it violates the lawyer's fiduciary duty to deal fairly with clients.⁵⁰ Since the conduct is illegal, it is therefore unethical.⁵¹

representation of litigants with adverse interests at a contested hearing would be neither intelligent nor informed."); *Schenck v. Hill, Lent & Troescher*, 140 Misc. 2d 288, 289, 530 N.Y.S.2d 486, 487 (Sup. Ct. 1988). In *Schenck*, a lawyer hired to sue another lawyer for malpractice was himself a potential defendant in the same action and obtained client consent to waive the conflict of interest. In disqualifying the lawyer, the court said, "[T]he consent obtained in this case does not reflect a full understanding of the legal rights being waived. . . . [T]he unsophisticated client, relying upon the confidential relationship with his lawyer, may not be regarded as able to understand the ramifications of the conflict, however much explained to him." *Id.* at 289-91, 530 N.Y.S.2d at 487 (citations omitted); see also *Wade v. Clemmons*, 84 Misc. 2d 822, 826, 377 N.Y.S.2d 415, 419 (Sup. Ct. Sp. Term 1975) (striking down contingent fee because client, if properly advised, would have refused to agree to settlement offer yielding fee but no client recovery). But cf. *Jones v. Jones*, 333 Mo. 478, 485-86, 63 S.W.2d 146, 149-50 (1933) (no evidence of fraud or undue influence existed in making of contract in spite of defendant's lack of legal background).

⁴⁵ This Article presents an abbreviated discussion of the ethical considerations surrounding lawyers' fees. For a fuller analysis, see *Contingent Fees*, *supra* note 3, at 44 n.65, 70-74; *Fee Arbitration*, *supra* note 37, at 289-92.

⁴⁶ *Contingent Fees*, *supra* note 3, at 44 n.65.

⁴⁷ MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 2-106(A) (1981) [hereinafter MODEL CODE]. The MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.5 (1983) [hereinafter MODEL RULES] restates the requirement as follows: "A lawyer's fee shall be reasonable." The Model Code's comparison in Rule 1.5 indicates that the only intended deviation from MODEL CODE DR 2-106(B) is the additional factor of the client's ability to pay, allowing courts to consider subsequent events in determining whether a fee is excessive.

⁴⁸ MODEL CODE, *supra* note 47, DR 5-103(A)(2); MODEL RULES, *supra* note 47, Rule 1.5(c); see also ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986).

⁴⁹ *Pennsylvania v. Delaware Valley Citizens for Clean Air*, 483 U.S. 711, 735-36 (1987) (Blackmun, J., dissenting): "In the private market, lawyers charge a premium when their entire fee is contingent on winning. . . . The premium . . . compensates for the risk of nonpayment if the suit does not succeed" *Id.* (emphasis in original).

⁵⁰ *Supra* notes 37-44 and accompanying text.

⁵¹ MODEL CODE, *supra* note 47, DR 2-106(A), DR 1-102(A)(1); MODEL RULES, *supra*

It is also unethical because by charging for a service that was not provided, the lawyer is "engag[ing] in conduct involving dishonesty, fraud, deceit or misrepresentation."⁵² Such conduct is also unethical because charging a contingent fee grossly disproportionate to any realistic risk of nonrecovery would amount to charging a "clearly excessive" and "unreasonable fee."⁵³ Accordingly, a lawyer who charged a one-third contingent fee in all cases, regardless of differing risks, would be charging an "illegal or clearly excessive" and "unreasonable fee" in those cases where there was little or no risk of nonrecovery or of greatly increased effort.⁵⁴

The lawyer's obligation to deal fairly with the client is also manifested in the requirement that the client give informed consent to all important decisions.⁵⁵ For consent, including consent to the fee ar-

note 47, Rule 8.4 comment; see also Martin, *When Are Fees Unconscionable?*, CAL. LAW., June 1988, at 88 ("A fee is illegal if it violates a . . . public policy.").

⁵² MODEL CODE, *supra* note 47, DR 1-102(A)(4); see also Committee on Legal Ethics v. Tatterson, 352 S.E.2d 107, 114 (W. Va. 1986) (holding that misrepresenting the difficulty of collecting proceeds to justify an excessive fee violates DR 1-102(A)(4)). A lawyer charging for a risk that was not assumed is the functional equivalent of a lawyer charging for hours of work that were not performed.

⁵³ *Supra* note 47; see also *In re Mercer*, 126 Ariz. 274, 277-78, 614 P.2d 816, 819 (1980) (holding that the inclusion of worker's compensation payment in contingent fee bill is a charge for which no services were performed and therefore is clearly excessive and violative of DR 2-106); *Tatterson*, 352 S.E.2d at 114 ("In the absence of any real risk, an attorney's purportedly contingent fee which is grossly disproportionate to the amount of work required is a 'clearly excessive fee' within the meaning of Disciplinary Rule 2-106(A)."); G. HAZARD & W. HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 74-75 (1985) (stating that contingent fee is unreasonable where risk of nonrecovery under given facts is negligible); 1 S. SPEISER, *ATTORNEYS' FEES* § 2.2, at 94 (1973), *cited with approval* in *People v. Nutt*, 696 P.2d 242, 248 (Colo. 1984) (holding that a contingent fee should not be fixed so high that it ceases to measure due compensation for professional services and makes lawyer "a partner or proprietor in the law suit"); *Contingent Fees*, *supra* note 3, at 71-72.

⁵⁴ A typical argument in support of a standard contingent fee is that it overcompensates lawyers in some cases in order to make up for the unsuccessful cases. See, e.g., *Romano v. Lubin*, 365 Pa. Super. 627, 631, 530 A.2d 487, 488 (1987) ("When the court calculates the fee of a plaintiff's attorney, it must consider that the very same attorney may have spent thousands of uncompensated hours working on other cases"); Aronson, *Attorney-Client Fee Arrangements: Regulation and Review*, FEDERAL JUDICIAL CENTER 82 (1980) ("the individual clients whose cases result in large recoveries pay more for their legal services than they might otherwise, in order to protect their attorney/insurer against the losses he has suffered and will continue to suffer from other cases"); Berger, *Court Awarded Attorneys' Fees: What is "Reasonable"?*, 126 U. PA. L. REV. 281, 324-25 (1977), *quoted in* *Clark v. Sage*, 102 Idaho 261, 265, 629 P.2d 657, 661 (1981). This Article rejects that argument. Overcharging violates the lawyer's fiduciary and ethical obligations to the client. In every contingent fee case, a lawyer may charge a risk premium that will compensate for the risks borne by the lawyer in that case. Success or failure in other cases is irrelevant to the fiduciary and ethical issues.

⁵⁵ MODEL CODE, *supra* note 47, EC 7-8 (as fiduciary, the "lawyer should exert his best efforts to insure that decisions of his client are made only after the client has been informed of relevant considerations"); MODEL RULES, *supra* note 47, Rule 1.4(b) ("[A] lawyer shall ex-

rangement to be "informed," the client must not only be given the relevant information⁵⁶ but must also comprehend it.⁵⁷

The client, therefore, must be given the option of whether to pay a contingent, hourly, or fixed fee⁵⁸ and has the right to be informed in a non-self-interested manner by the lawyer⁵⁹ regarding which option represents the client's, not the lawyer's, best interest.⁶⁰

plain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation"); see also MODEL CODE, *supra* note 47, EC 7-7 ("it is for the client to decide whether he will accept a settlement offer"); MODEL RULES, *supra* note 47, Rule 1.2(a). See generally Spiegel, *Lawyer and Client Decisionmaking: Informed Consent and the Legal Profession*, 128 U. PA. L. REV. 41 (1979) (arguing that the doctrine of informed consent should be applied to the lawyer-client relationship). The correlative duty of the lawyer to disclose all material information to the client comes from the law of agency. See F. MECHAM, OUTLINES OF THE LAW OF AGENCY § 541 (4th ed. 1952); cf. RESTATEMENT (SECOND) OF AGENCY § 381 (1957).

⁵⁶ See, e.g., *Burnham v. Heselton*, 84 Me. 578, 20 A. 80 (1890) (after determining that payment of a \$250 note was assured, but not disclosing that information to the client, lawyer hired to collect the note proposed and client accepted fee of all collected proceeds above \$75; struck down because the lawyer had not informed the client of all material facts bearing on the appropriateness of the fee known to the lawyer); *Kickland v. Egan*, 36 S.D. 428, 439, 155 N.W. 192, 195 (1915) (lawyer should have advised the client before bargaining for fee that services would be nominal because another firm was representing the estate and would be doing most of the work; therefore, one-third contingent fee of the amount client was to receive was struck down). "Only after . . . disclosure [of all fee information] is given can a client's consent to pay a certain fee be considered truly voluntary." 1 G. HAZARD & W. HODES, *supra* note 53, at 71.

⁵⁷ *Contingent Fees*, *supra* note 3, at 67 n.130; see also *supra* note 44.

⁵⁸ MODEL RULES, *supra* note 47, Rule 1.5 comment ("When there is doubt whether a contingent fee is consistent with the client's best interest, the lawyer should offer the client alternative bases for the fee and explain their implications."). The requirement that the lawyer must extend the option to the client to pay an hourly rate is implicit in the Ethical Considerations of the MODEL CODE, *supra* note 47, the comment to Rule 1.5, and the fiduciary requirement that the lawyer deal fairly with prospective or actual clients. See ABA Comm. on Ethics and Professional Responsibility, Informal Op. 1521 (1986); see also *In re Reisdorf*, 80 N.J. 319, 403 A.2d 873 (1979); *Estate of Vafiades v. Sheppard Bus Serv. Inc.*, 192 N.J. Super. 301, 469 A.2d 971 (N.J. Super. Ct. Law Div. 1983); MICH CT. R. 8.121(E) ("An attorney must advise a client, before entering a contingent fee arrangement, that attorneys may be employed under . . . hourly or per diem basis."); N.J. CT. R. 1:21-7(b) ("An attorney shall not enter into a contingent fee arrangement without first having advised the client of the right and afforded the client an opportunity to retain him under an arrangement whereby he would be compensated on the basis of the reasonable value of his services."); WIS. STAT. ANN. § 655.013(2) (West 1980 & Supp. 1988) (in a malpractice action, attorney must offer client option of paying on a per diem or hourly basis).

⁵⁹ *Supra* notes 38-39.

⁶⁰ 520 E. 72nd Commercial Corp. v. 520 E. 72nd Owners Corp., 691 F. Supp. 728, 738 (S.D.N.Y. 1988), *aff'd*, 872 F.2d 1021 (2d Cir. 1989); MODEL CODE, *supra* note 47, EC 2-20 ("a lawyer generally should decline to accept employment on a contingent fee basis . . . [if his client] is able to pay a reasonable fixed fee . . . [but] where justified by the particular circumstances of a case [it is not necessarily improper for a lawyer] to enter into a contingent fee contract . . . with . . . [a] client who, after being fully informed of all relevant factors, desires that arrangement"); see also MODEL CODE, *supra* note 47, EC 5-7; MODEL RULES, *supra* note 47, Rule 1.5 comment; 2 E. THORNTON, ATTORNEYS AT LAW 743 (1914) ("Attorneys, in entering into contracts of employment with clients, are required to exercise the highest order

V. GAGNON, FIDUCIARY LAW AND ETHICAL OBLIGATION

Application of the fiduciary and ethical principles explicated in this Article leads to the conclusion that the one-third fee charged in *Gagnon* was illegal and unethical.

The attorney did not: offer the client the option of paying an hourly rate; inform the client that it was in the client's best interest that he be retained on an hourly rate; inform the client that there was very little risk of nonrecovery and that a multimillion dollar recovery was highly likely; or inform the client that a one-third contingent fee would likely yield the attorney a fee of at least one thousand dollars per hour.

For the court to exclude fiduciary and ethical requirements because the client did not complain of the fee is to disregard the fiduciary and ethical requirement of informed consent.⁶¹ For the court to fail to even discuss the applicable fiduciary and ethical principles requires no characterization; only a concurring opinion by Justice Greaney even acknowledges that the issue of risk is germane to the ethical and legal validity of a contingent fee.⁶² That acknowledgment, however, did not rise to the level of acknowledging a client's reciprocal fiduciary and ethical rights when charged a one-third contingent fee.⁶³

VI. "MONEY MAKES THE WORLD GO ROUND"⁶⁴

The decision of the Massachusetts Supreme Judicial Court to ef-

of good faith . . . disclosing all information . . . as to facts which would or might influence him either in entering into, or refusing to execute the contract." The lawyer has a fiduciary duty "to present fairly and fully the nature of what he might be called upon to do in the prospective lawsuit and the nature of his representation, the values at stake, and the likelihood of success." *Id.*

⁶¹ In a possible passing gesture at informed consent, the court stated that the client had "intelligently and freely testified that he was satisfied with the amount of the fee." *Gagnon v. Shoblom*, 409 Mass. 63, 67 (1991). It is unclear what the court meant by "intelligently." When viewed from the perspective of the principles elucidated in this Article, the client was not intelligent with regard to the degree he had been taken advantage of by his attorney. See *infra* text accompanying notes 72-74.

⁶² *Gagnon*, 409 Mass. at 69-72 & n.1 (Greaney, J., concurring). Justice Greaney therein states:

At a time when the gap between the service and the [contingent] fee in tort cases appears to be becoming more and more pronounced, there may be a need to establish a better sense of proportion. This case is illustrative of the problem. The question raised by the [trial] judge deserves honest debate.

Id. at 72 (footnote omitted).

⁶³ "[T]he one-third percentage has become institutionalized in the practice of the litigation bar as the minimum rate to be charged in the typical tort case. Change, if it is to come, should not come suddenly and to the disappointment of long-standing expectations." *Id.* at 70.

⁶⁴ *Money*, CABARET (lyrics by Fred Ebb).

fectively narrow the reach of fiduciary principles and ethical rules relating to contingent fees was strongly supported by the Massachusetts Bar Association and the Massachusetts Academy of Trial Lawyers.⁶⁵ The trial judges's reduction of the fee from \$975,000 to \$695,000 was not, of course, a simple matter of a \$280,000 differential.⁶⁶ It portended millions of dollars in reduced fees in the future,⁶⁷ especially in view of the fact that lawyers routinely charge substantial contingent fees in cases in which there is insubstantial risk. Indeed, contingent fees in personal injury cases yield plaintiffs' lawyers enormous sums of money—in the range of \$13 billion annually.⁶⁸ Plaintiffs' lawyers have used this wealth to purchase considerable influence in Congress, thwarting all legislation that might conceivably threaten their fee interests.⁶⁹ By one estimate, these contributions, in toto, exceed all other single-issue contributions in national politics.⁷⁰ In view of the above realities, and the serious abuses that exist in the area of contingent fees,⁷¹ courts should exercise extreme care in discharging their responsibilities to clients. Simply noting that the client has not objected to the one-third fee does not discharge that responsibility. Moreover, the client in *Gagnon* indicated that he had interviewed several other law firms; all had quoted him the same one-third contingent fee.⁷² Obviously, he could have only concluded that a one-third fee was the industry standard—as indeed it is.⁷³ Accordingly, the client

⁶⁵ See *supra* note 4.

⁶⁶ The decision in this case could affect attorney's fees in every action in courts of this Commonwealth where there is a contingency fee agreement. Many of the statements . . . [by the lower court] could be deemed to apply to a wide range of situations beyond the case that was specifically before him.

Brief for Massachusetts Bar Association, Thirteen County Bar Associations, and Women's Bar Association, as Amici Curiae in support of Appellant at 12, *Gagnon* (No. 5399).

⁶⁷ I have recently testified at a fairness hearing before a representative of United States District Judge Jack Weinstein about a reduction of plaintiffs' attorney fees in claims before the Manville Personal Injury Trust. Testimony of Lester Brickman (Fairness Hearing), *Findley v. Blinken (In re Johns Manville)*, Ch. 11 Case Nos. 82 B 11656 to 82 B 11676 (E.D.N.Y. Jan. 2, 1991) (CA 90-3973). I proposed that a reduction, not from the prevailing rate averaging thirty-five percent but rather from the proposed limitation of twenty-five percent, to \$250 an hour or \$75 an hour more than the average hourly rate charged by defendants' attorneys in asbestos cases, would save the Manville fund as much as \$250 million over the life of the fund.

⁶⁸ Income from contingent fees in personal injury cases exceeded \$10 billion dollars in 1985. *Contingent Fees*, *supra* note 3, at 76 n.186. Adjusting that to 1991 dollars and adding a component to reflect the enormous contingent fees being generated by asbestos litigation yields an amount in excess of \$13 billion dollars.

⁶⁹ See Moore, *Trial Lawyers on Trial*, 49 NAT'L J. 2962 (Dec. 8, 1990); England, *Congress, Nader and the Ambulance Chasers*, AM. SPECTATOR, Sept. 1990, at 18.

⁷⁰ England, *supra* note 69, at 18.

⁷¹ See *Contingent Fees*, *supra* note 3, at 113, 127-28.

⁷² Affidavit of Donald Gagnon at 3 (Jan. 7, 1989), *Gagnon* (No. 5399).

⁷³ "[T]he one-third percentage has become institutionalized in the practice of the litigation

would likely not have regarded the one-third fee unfair since that was what all lawyers apparently charged. However, if all the price information that the client was provided with was the contingent fee percentage, he was not in the position to give his informed consent.⁷⁴ Unless the client is informed of the projected hourly rate that the contingent fee is designed to yield, he simply is not in a position to comprehend what he is really being charged. Moreover, by sustaining the one-third fee, courts are lending their imprimatur to price-fixing. For over one hundred years, lawyers have successfully sought to insulate themselves from market forces. A central feature of all codes of ethics and other bar association regulations of lawyer conduct has been the restraint on price competition. Despite United States Supreme Court intervention,⁷⁵ the institutional conditions necessary to a competitive market do not yet exist in the legal services context. This is most especially true for contingent fees. The evidence that contingent fees yield more than competitive rates of return is far-ranging.⁷⁶ The industry standard one-third fee did not result from the operation of competitive market forces but rather from political decisions.⁷⁷ But for these political decisions, the industry standard today would be fifty percent.⁷⁸ A court does not effectuate its responsibilities to clients by joining with the bar⁷⁹ to enforce the current industry standard against clients.

The courts as guardians of clients' correlative fiduciary and ethical rights should reject *Gagnon v. Shoblom* as the industry standard for judicial regulation of contingent fees. *Sed quis custodiet ipsos Custodes?*⁸⁰

bar as the minimum rate to be charged in the typical tort case." *Gagnon*, 409 Mass at 70 (Greaney, J., concurring); see also *Contingent Fees*, *supra* note 3, at 100 n.280.

⁷⁴ *Supra* note 55 and accompanying text.

⁷⁵ See, e.g., *Shapiro v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988); *Bates v. State Bar*, 433 U.S. 350 (1977); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

⁷⁶ See *Contingent Fees*, *supra* note 3, at 103-11.

⁷⁷ *Id.* at 106-107.

⁷⁸ *Id.*

⁷⁹ As evidence that a one-third fee was reasonable, the court noted that "a leading member of the bar who specializes in prosecuting personal injury claims for plaintiffs testified as to the reasonableness of the fee." *Gagnon*, 409 Mass. at 64.

⁸⁰ JUVENAL, VI SATIRES line 347, quoted in J. BARTLETT, FAMILIAR QUOTATIONS, at 122) (E. Beck 15th ed. 1980) ("But who is to guard the guards themselves?"). To which Plato, in effect responded 300 years earlier: "What an absurd idea—a guardian to need a guardian!" PLATO, THE REPUBLIC, Book 3, 403-E (quoted in J. BARTLETT, *supra*, at 122). Today, the idea is no longer absurd.